

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

**N.E. COLORADO CELLULAR, INC. d/b/a VIAERO WIRELESS
PETITION FOR WAIVER OF PERFORMANCE DEFAULT PAYMENT
REQUIREMENTS AND OTHER LIABILITIES APPLICABLE TO
MOBILITY FUND PHASE I PUBLIC INTEREST OBLIGATIONS**

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SUMMARY

N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless, has experienced a quarter century of success in bringing mobile voice and broadband services to rural communities in Colorado, Kansas, and Nebraska, and has successfully deployed 4G broadband networks in 25 Census Tracts in Colorado and Nebraska, for which it was the winning bidder in Auction 901.

Viaero is submitting this Petition for Waiver because unexpected and insoluble difficulties will prevent it from complying with the Mobility Fund Phase I network coverage requirement in three Census Tracts located in Colorado, forcing Viaero to default in those Census Tracts. The Petition presents a compelling case that, because of the special circumstances involved, the Commission should grant Viaero's Petition, deviate from its general rule, and refrain from imposing a default penalty payment and certain other penalties.

Efforts To Deploy 4G Broadband in the Three Census Tracts

Most of the unserved road miles in the three Census Tracts are located in the Rio Grande National Forest. Faced with difficulties in acquiring land use rights needed for the construction of cellular tower sites in the Forest, Viaero engaged in extensive discussions with U.S. Forest Service officials to explore various options for securing authorization to construct the sites. Viaero also evaluated the option of locating some of the sites on private lands in the three Census Tracts, and initiated discussions with the Bureau of Land Management to seek approval for constructing sites on lands in BLM's jurisdiction.

In addition, Viaero utilized Phase I support and its own funds to carry out extensive site surveys and engineering analyses in the Rio Grande Forest, and it also invested its own capital to

construct backhaul facilities in areas adjacent to the three Census Tracts so that the 4G facilities Viaero planned to deploy in the Tracts could interconnect with Viaero's network.

Problems That Blocked Deployment in the Three Census Tracts

Although Viaero understood, at the time it bid for the three Census Tracts in Auction 901, that it would need to navigate a time-consuming and expensive process to secure the right to construct tower sites in the Rio Grande Forest, it could not have anticipated or avoided the daunting series of difficulties that have prevented its deployment efforts, and that ultimately have left it no option other than to default.

Gaining Forest Service approval for site construction was hampered at the outset by the fact that the route to approval must traverse a complicated process that requires amending the 1996 Forest Plan for the Rio Grande Forest, and that would likely take 24 to 36 months to complete for each proposed site in the Forest.

Even worse, the Forest Service indicated in December 2014 that it was launching an extensive and time-consuming process for revising the 1996 Plan. It advised Viaero that, in light of this revision process, it would no longer consider amendments to the 1996 plan, and it would not even begin to review Viaero's site construction proposals until 2018, at the earliest.

In the face of these setbacks to its construction timetable, Viaero continued its efforts to explore options for constructions on private lands, and after enormous effort at an extraordinary cost, it ultimately concluded that this avenue for site construction was neither feasible nor sufficient to aid Viaero in meeting the Phase I network coverage requirement. Viaero also carried out extensive and expensive remapping of lands in the Rio Grande Forest (using Forest Service maps

that are considerably more up to date than maps relied upon by the Commission), but, although the remapping revealed a greater percentage of network coverage than was depicted by the Commission's maps, the improvement in coverage was not sufficient to bring Viaero within reach of the 75 percent coverage requirement.

Finally, in June 2016, the Forest Service closed the door on any chance Viaero might have to construct on lands in the Forest Service's jurisdiction in the Rio Grande Forest, advising in a letter that it could not anticipate ever approving any of Viaero's construction proposals. This Forest Service pronouncement has made it impossible for Viaero to comply with the Phase I network coverage requirement, thus forcing its default.

Grounds for Granted the Waiver Petition

There is good cause to grant the Petition because, although Viaero has engaged in numerous efforts and explored numerous options in seeking to comply with Phase I network coverage requirement, a special circumstance, which was not caused by Viaero and is beyond Viaero's control to remedy, has now made it impossible for Viaero to achieve compliance. Specifically, as explained above, the Forest Service has explicitly indicated that it cannot anticipate ever granting approval for tower site construction that is necessary for Viaero to comply with Phase I requirements.

The general rule is that carriers that do not meet Phase I requirements must return their Phase I support and pay a 10 percent default penalty. The Commission also may bar defaulting carriers from receiving any future Mobility Fund or other universal service support.

Viaero demonstrates in the Petition that the Commission should deviate from this general

rule due to special circumstances and that imposition of a penalty will not serve the purpose of the rule. Moreover, equity warrants grant of the waiver because it is unfair to impose a penalty on an applicant prevented from performing by a federal government agency, and because a waiver will serve the public interest by promoting implementation of the Commission's Mobility Fund policies.

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N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless, (“Viaero”), by counsel and pursuant to Section 1.3 of the Commission’s Rules,¹ hereby submits this petition for waiver (hereinafter, the “Petition”) with respect to certain specified Census Tracts in Colorado for which Viaero was a winning bidder in Auction No. 901 for Mobility Fund Phase I (“Phase I”) support.²

¹ 47 C.F.R. § 1.3.

² *Mobility Fund Phase I Support Authorized for 40 Winning Bids, Default on 23 Auction 901 Winning Bid Determined*, Public Notice, 28 FCC Rcd 11040 (WTB, WCB 2013) (“*Authorization Public Notice*”) (authorizing support for Viaero as the winning bidder in 28 Census Tracts, and determining that Viaero’s bids were in default in 22 Census Tracts); see *Mobility Fund Phase I Auction Closes, Winning Bidders Announced for Auction 901*, FCC Public Notice, 27 FCC Rcd 12031, 12045 (Att. A) (2012).

The Petition seeks a waiver of provisions in the Commission's rules that, in the event a wireless carrier authorized to receive Phase I support is unable to meet its minimum network coverage requirement or otherwise comply with Phase I public interest obligations, would (1) impose a 10 percent performance default penalty;³ and (2) authorize disqualification of the carrier from the receipt of Mobility Fund Phase I support or other universal service support.⁴

I. INTRODUCTION.

Viaero is the authorized winning bidder in Auction 901 for 28 Census Tracts located in Colorado and Nebraska, covering 7,340.67 eligible, unserved road miles,⁵ in which Viaero has committed to construct 4G LTE broadband ("4G") networks not later than July 30, 2016. Viaero's winning bids for the 28 Tracts amounted to \$21,456,196.99.⁶

Viaero has operated a successful and growing cellular and mobile wireless broadband business since 1991. Its management has extensive experience operating wireless voice and broadband networks, and has a proven record of success in providing services in Colorado, and in other jurisdictions, with a longstanding focus on both consumers and businesses in rural areas. Rather than rely on roaming agreements for highway coverage (which is the business plan of

³ 47 C.F.R. § 54.1006(f) (liability for failing to satisfy public interest obligations). *See Mobility Fund Phase I Auction Scheduled for September 27, 2012, Notice and Filing Requirements and Other Procedures for Auction 901*, AU Docket No. 12-15, Public Notice, 27 FCC Rcd 4725, 4777 (para. 189) (WTB, WCB 2012) (adopting a performance default penalty of 10 percent of the total level of support for which a winning bidder is eligible).

⁴ 47 C.F.R. § 54.1006(f). The rule further provides that the funding recipient also "will be subject to repayment of the [Phase I] support disbursed...." *Id.* Viaero is not seeking waiver of this provision in the rule.

⁵ *Mobility Fund Phase I Auction – Winning Bids Sorted by Bidder*, accessed at http://wireless.fcc.gov/auctions/901/reports/901winning_bids_by_bidder.pdf.

⁶ *See Authorization Public Notice*, 28 FCC Rcd at 11042 (Att. A).

most large carriers), Viaero has purchased spectrum, and combined federal and state universal service support with its own funds to extend its networks into some of the most remote and sparsely populated areas of Colorado, Kansas, and Nebraska.

Viaero also has an extensive history of working with local communities and groups, building retail outlets and towers designed to bring wireless voice and broadband services to small towns. Viaero has also delivered on its commitments to work with public safety organizations, hospitals, and local governments in these rural communities. On information and belief, in areas where it serves, first responders use Viaero's network more than competing networks because the company delivers superior coverage and reliability.

With respect to Viaero's compliance with its Phase I public interest obligations, it presently is on target to meet the 75 percent coverage requirements for its 4G network, and to comply with other Phase I public interest obligations, in 22 of the Census Tracts for which Viaero was the winning bidder in Auction 901. It has worked diligently and efficiently in utilizing Phase I support, combined with its own capital investments, to deploy its network and bring wireless voice and broadband networks to rural communities in each of these 22 Census Tracts.⁷

Viaero, however, has encountered unanticipated and insurmountable difficulties in meeting the network coverage requirements in three Census Tracts in Colorado (collectively referred to as the "Waiver Tracts" or "Tracts"):

⁷ There are three other Census Tracts, numbers T08071000500, T31091956700, and T31107976400-3565, for which Viaero is also unable to construct, but for which it seeks no waiver.

CENSUS TRACT	COUNTY	SAC	UNSERVED ROAD MILES	WINNING BID
T08021974900	Conejos	468004	186.13	\$1,617,841.96
T08079973600	Mineral	468016	298.50	\$2,594,562.00
T08109977600	Saguache	468017	880.07	\$7,649,568.44
TOTAL			1,364.70	\$11,861,972.40

Viaero has worked diligently and continuously during the three-year period since posting the winning bids for the Waiver Tracts in Auction 901 to pursue all the steps necessary to ensure network deployment meeting the Phase I requirements in each of the three Tracts.

As explained below, factors that Viaero could not reasonably have anticipated and that are entirely outside of Viaero's control, have combined to make it impossible to meet these requirements. Because of these insuperable problems, Viaero is now prepared to default in each of these three Waiver Tracts because it cannot foresee any possibility of ever being able to comply with the Phase I public interest obligations in these Tracts.

For the reasons discussed below, Viaero requests a waiver of provision of Section 54.1006(f) of the Commission's Rules that otherwise would require Viaero to pay a penalty of 10 percent of the amount of its winning bids for each of the Waiver Tracts as a result of its default, and that also would authorize the disqualification of Viaero from receiving Phase I support or other universal service support.

II. CIRCUMSTANCES BEYOND VIAERO'S CONTROL HAVE MADE IT VIRTUALLY IMPOSSIBLE FOR VIAERO EVER TO COMPLY WITH NETWORK COVERAGE REQUIREMENTS AND OTHER PUBLIC INTEREST OBLIGATIONS IN THE THREE WAIVER CENSUS TRACTS.

To be successful in demonstrating a basis for its request for a waiver of Section 54.1006(f) penalty requirements and other provisions, Viaero must plead "with particularity the facts and

circumstances” warranting a grant of the requested waiver.⁸ Viaero presents these required showings for each of the three Waiver Tracts in the following sections. In addition, attached to the Petition as Exhibit A, Viaero provides a Declaration Under Penalty of Perjury of Francis J. DiRico, Viaero’s President, attesting to the facts stated in the Petition.

Specifically, Viaero demonstrates that it has made every reasonable effort, and explored every reasonable option and possibility, to enable it to deploy 4G networks in each of the three Waiver Tracts that would meet the Phase I public interest obligations by the July 30, 2016, deadline. As shown below, obstacles have arisen, relating to its acquisition of rights to construct towers at sites in each of the Tracts, that Viaero could not reasonably have foreseen or prevented, and that have made it impossible for Viaero ever to construct sites that are necessary to meet the 75 percent network coverage requirement in each Tract.

A. Viaero Has Worked Diligently To Facilitate 4G Broadband Network Deployment in the Three Waiver Tracts.

Significant portions of the territories in each of the three Waiver Tracts consist of federal lands managed by the U.S. Forest Service (“Forest Service”), an agency of the U.S. Department of Agriculture, or by the Bureau of Land Management (“BLM”), an agency of the U.S. Department of the Interior. Approximately 92 percent of the Mineral County Census Tract consists of federal lands; approximately 66 percent of the Conejos County Census Tract consists of federal lands; and approximately 76 percent of the Saguache County Census Tract consists of federal lands.⁹

⁸ *Rio Grande Radio Family Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968). See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, n.9 (D.C. Cir. 1969) (“*WAIT Radio*”), cert. denied, 409 U.S. 1027 (1972).

⁹ Attached here to as Exhibit B are maps of each Tract, depicting the federal lands in green, with eligible census blocks overlaid in shaded areas.

The extent of federal ownership and management of lands located in the Waiver Tracts has made it imperative for Viaero to negotiate successfully with the Forest Service and BLM to gain approvals to build tower sites in each of the Waiver Tracts.

Viaero's plan for complying with Phase I public interest obligations by the July 30, 2016, deadline called for the construction of 53 tower sites throughout the three Waiver Tracts, with 15 sites located in the Conejos County Tract, 15 sites located in the Mineral County Tract, and 23 sites located in the Saguache County Tract. Of these 53 proposed sites, 29 were to be located on federal lands - 6 sites on land controlled by the BLM and 23 on Forest Service lands in the Rio Grande National Forest¹⁰ ("Rio Grande Forest").¹¹ Viaero's construction of tower sites on lands under the Forest Service's jurisdiction in the Rio Grande Forest is the *sine qua non* for Viaero's compliance with the Phase I network coverage requirement in each of the Waiver Tracts. In the absence of construction in the Rio Grande Forest, Viaero simply cannot comply with the Phase I requirement.

Unfortunately, Viaero has been unsuccessful in obtaining Forest Service authorization for construction of any of the planned construction sites in the Rio Grande Forest. Thus, Viaero has been prevented from undertaking any construction at any of the planned Rio Grande Forest sites

¹⁰ President Theodore Roosevelt signed an Executive Order in 1908 officially creating the Rio Grande National Forest. The Forest spans 1.84 million acres in south central Colorado, along the eastern slope of the Continental Divide.

¹¹ Additional construction of 23 tower sites was planned by Viaero in the Gunnison National Forest, which is also under the jurisdiction and management of the Forest Service. Further, Viaero's build-out plan required the construction of 6 sites on lands under the jurisdiction and management of BLM. These sites are not at issue in the Petition because the circumstances prompting Viaero's waiver request involve lands in the Rio Grande Forest.

under the Forest Service’s jurisdiction in any of the three Tracts. Notwithstanding these difficulties relating to site acquisitions in the Rio Grande Forest, and before it became evident that Forest Service policies would foreclose any opportunity for Viaero to successfully negotiate for the use of sites in the Rio Grande Forest, Viaero took numerous steps to advance its efforts to comply with the Phase I network coverage requirement and other public interest obligations.

First, Viaero engaged in extensive discussions with Forest Service officials to explore options for obtaining authorizations for site construction in the Rio Grande Forest that would facilitate network deployment needed to meet the Phase I network coverage requirement by the July 30, 2016, deadline.¹²

Second, Viaero explored opportunities for constructing tower sites on private lands in the three Waiver Tracts, and analyzed the extent to which the utilization of private sites, to the extent they may be available, could play a significant factor in meeting the network coverage requirement. For example, Viaero identified several private land sites that possibly could serve as tower locations, and Viaero personnel visited each prospective site,¹³ to evaluate accessibility to the site, the site’s proximity to power sources, and whether Viaero would need to undertake access improvements that would require Forest Service or BLM approval.

Third, Viaero invested approximately \$2.4 million of its own capital resources to construct cell sites and microwave network access facilities outside areas in the three Waiver Tracts that

¹² See Letter from Dan Dallas, Forest Supervisor, U.S. Forest Service, to Jon Becker, Vice President, Government Affairs, Viaero (June 28, 2016) (“Forest Service Letter”), at 1 (describing discussions between Viaero and Forest Service staff). The letter is attached to the Petition as Exhibit C.

¹³ Because of winter weather conditions, Viaero’s inspections of prospective construction sites were limited to the months of May through September.

are eligible for Phase I support. Viaero expended the time and resources necessary to construct these facilities because they are necessary to interconnect facilities Viaero planned to construct in the Tracts to Viaero's network, enabling Viaero to provide voice and broadband services to consumers in the Tracts.

These construction projects were complicated by the fact that any changes that were necessitated in the planned location of tower sites within eligible areas in the Waiver Tracts required corresponding changes in the design of Viaero's existing network, because of the need for line-of-sight microwave links between towers located in the Waiver Tracts and Viaero's existing mobile wireless network.

Fourth, Viaero expended an additional \$1.2 million (including both Phase I support and its own funds) to carry out engineering analyses and site surveys, and to engage in its extensive and ongoing discussions with Forest Service officials related to Viaero's efforts to obtain approval for its proposed cellular tower sites in the Rio Grande Forest.

And, fifth, because 6 planned tower sites are located on lands under the jurisdiction and management of BLM,¹⁴ Viaero also engaged in extended discussions with BLM officials regarding compliance with applicable BLM land use requirements, including the need for environmental impact analyses for each proposed site. Viaero spent an additional \$260,000 (including both Phase I support and its own funds) in connection with these interactions with BLM. To accomplish all of these tasks, Viaero assigned a full-time person to completing the various tasks described above. Over two years ago, Viaero relocated Mr. Henry Jacobsen to South Fork, Colorado, so that

¹⁴ See note 10, *supra*, and accompanying text.

he could be based near the relevant areas and work on-site full time to manage all aspects of this project.

B. Viaero Will Not Be Able To Secure Approval from the U.S. Forest Service To Construct Tower Sites, Required To Meet Mobility Fund Phase I Network Coverage Requirements, on Federal Land in the Rio Grande Forest.

At the time Viaero bid successfully for Phase I support in September 2012, it was aware that the tower site construction it would be required to complete in the Waiver Tracts would require it to seek and obtain approvals from the Forest Service and BLM for its access to, and utilization of, most of the proposed construction sites in the Waiver Tracts. Viaero was also aware that it would need to expend significant resources to successfully navigate the Forest Service and BLM review processes, and that the duration of these processes could be lengthy. At that time, Viaero had no reasonable basis for anticipating that the series of issues described in the following paragraphs would arise and combine to preclude Viaero from constructing towers in the Rio Grande Forest, thus making it impossible for Viaero to comply with Phase I requirements.

1. The Rio Grande Forest Plan.

The Forest Service's process for reviewing and approving any proposed utilization of lands in the Rio Grande Forest for the construction of tower sites, or for other purposes, is neither streamlined nor straightforward. Tower site construction proposals must be crafted as amendments to the Forest Land Management Plan ("Forest Plan") for the Rio Grande Forest.¹⁵

¹⁵ The current Forest Plan was adopted in 1996. As will be discussed in a following section, Forest Plans for the national forests generally are comprehensively revised after being in effect for a period of approximately 15 to 20 years. Prior to the periodic comprehensive revisions, existing Plans may be amended. See U.S. Forest Service, Rio Grande National Forest, Rio Grande National Forest Plan Revision ("Forest Service Plan Revision Website"), *accessed at*:

As Viaero engaged in discussions with the Forest Service concerning Viaero's proposals for tower site construction in the Rio Grande Forest, it became evident that the task of amending the Forest Plan would be an intensive effort requiring a considerable commitment of time and resources. Viaero's initial discussions with Forest Service officials led Viaero to conclude that it would take approximately two to three years to prepare construction proposals for each site, to go through the Forest Plan amendment process, and to secure the Forest Service's approval of the amendments. Moreover, given the number of sites involved, and the fact that each site would be subjected to independent and separate consideration by the Forest Service, it became clear to Viaero that it would not be able to pursue consideration and approval for all the Waiver Tract sites concurrently.

Based upon its assessment of the timetables involved for seeking and obtaining amendments to the Forest Plan for the construction of all proposed tower sites in the Rio Grande Forest, Viaero anticipated at this juncture that it would be necessary to seek from the Commission an extension of the July 30, 2016, network coverage deadline, because, given the complexities of the Forest Service review process, construction, network integration, and testing could not be completed for all sites in the Waiver Tracts by the existing deadline.

2. Revision of the Forest Plan.

Viaero's efforts to navigate the process of securing Forest Service approval for the construction of cellular tower sites in the Rio Grande Forest suffered another setback in December 2014, when the Forest Supervisor for the Rio Grande Forest announced the initiation of a forest

<http://www.fs.usda.gov/detail/riogrande/landmanagement/projects/?cid=stelprd3819044>.

planning process, for the purpose of revising the 1996 Forest Plan, that would “result[] in a Forest Land Management Plan which describes the strategic direction for management of forest resources for the next fifteen to twenty years on the Rio Grande National Forest.”¹⁶

The initiation of the Forest Plan revision process had significant consequences for Viaero’s pursuit of Forest Service approval of its construction proposals in the Rio Grande Forest. Specifically, Viaero was advised that, for the duration of the revision process, the Forest Service would no longer consider or approve amendments to the 1996 Forest Plan. This meant that the Forest Service would “be in no position to address [Viaero’s] grant construction applications until 2018, at the earliest.”¹⁷ The Forest Service decision to revise the 1996 Plan was prompted largely by the Windy Pass, Papoose and West Fork Fires that consumed over 100,000 acres (150+ square miles).¹⁸

In light of the Forest Service’s indication to Viaero that no amendments to the Rio Grande Forest Plan would be considered during the pendency of the Forest Plan revision process, Viaero concluded at this juncture that it was faced with two options for deploying a 4G network in the three Waiver Tracts that complies with the Phase I coverage requirement. Viaero could request from the Commission an extended waiver of the July 30, 2016 build-out deadline, since Viaero

¹⁶ U.S. Forest Service, *Assessment Report of Ecological, Social, and Economic Sustainability, Conditions, and Trends for the Rio Grande National Forest*, Notice of Initiating the Assessment Phase of the Rio Grande National Forest Land Management Plan Revision (Dec. 17, 2014), 79 Fed. Reg. 77444 (Dec. 24, 2014). “This Revision process is governed by the recently finalized 2012 Planning Rule for all national forests.” Forest Service Plan Revision Website. See 36 C.F.R. Part 219 (Planning).

¹⁷ Forest Service Letter at 1.

¹⁸ See, <http://inciweb.nwcg.gov/incident/3436/>.

would not be able to even pursue approval of proposed tower sites in the Rio Grande Forest until at least 2018.

Alternatively, Viaero could seek to identify viable tower sites located on private lands in the three Waiver Tracts, and to evaluate the extent to which construction on private lands could contribute to meeting the 75 percent network coverage requirement.

3. Tower Sites on Private Lands.

Faced with the prospect of not being able to gain timely access to lands in the Rio Grande Forest under the jurisdiction of the Forest Service, Viaero shifted its focus to exploring options for constructing towers on private lands in the three Waiver Tracts.¹⁹ It ultimately determined that, because of several problems, these options were not feasible.

First, the majority of private land areas in the Waiver Tracts are situated in low-lying valleys (such as dried river bottoms). Site construction at such locations would not provide sufficient signal coverage to serve the required percentage of unserved roads in the Waiver Tracts.

Second, other private land areas in the Waiver Tracts, which would be suitable for site construction and for signal access to unserved areas, presented a different set of problems. Most of these lands are subject to patent mining claims, which required Viaero to engage in extensive, expensive, and time-consuming efforts to research the claims, which, in many instances, were

¹⁹ This exploration included private lands in the Rio Grande Forest, and private lands in the Waiver Tracts that were in proximity to the Rio Grande Forest. Viaero notes that “[p]rivate land inholdings within the boundaries of the [Rio Grande] forest are outside of the forest plan area, but are taken into consideration in the planning process because they influence management of the plan area.” *Rio Grande National Forest – Draft Assessment 14, Land Status and Ownership, Use, and Access Patterns* (undated), at 1, accessed at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd486203.pdf.

poorly documented, and to attempt to contact successors to the claims for purposes of initiating negotiations whereby Viaero could begin to secure access to the lands for tower construction.²⁰

Third, Viaero's efforts to negotiate land use agreements with private land leaseholders were less productive than Viaero had hoped, leading Viaero to conclude in the autumn of 2015 that it would not be able to reach agreement with a sufficient number of leaseholders to enable construction of the tower sites required to meet the Phase I network coverage requirement in any of the Waiver Tracts.

And, fourth, Viaero ultimately concluded that, even if it had been possible to secure arrangements with a greater number of owners of private lands in the three Waiver Tracts, this still would not provide a viable path toward meeting the 75% coverage requirement. Sites on private lands were randomly scattered islands across the three Waiver Tracts, making it impossible from an engineering perspective to utilize the private lands to meet the network coverage requirements unless Viaero could link the sites constructed on these private lands with microwave sites constructed on lands under the jurisdiction of the Forest Service and BLM, respectively. In addition, significant road improvements would be required on Rio Grande Forest lands in order for Viaero to access site locations and build sites on the private lands, which improvements were subject to the Forest Plan as well.²¹ It is also important to note that Viaero was simultaneously building out the rest of its Auction 901 network, not an insubstantial task for a small business.

²⁰ As discussed above, Viaero personnel also visited the potential construction sites located on private lands. See note 12, supra, and accompanying text.

²¹ Forest Service Letter at 1.

4. Remapping the Waiver Tracts.

As Viaero assessed the tower site construction delays in the Waiver Tracts resulting from the Forest Service's determination that it would not review or approve any amendments to the 1996 Rio Grande Forest Plan, Viaero pursued another avenue that could facilitate some site construction in the Tracts in the interim.

Viaero employees drove throughout the three Waiver Tracts and determined that there were substantial inaccuracies in mapping information relied upon by the Commission. For example, the Commission maps depicted roads in the Waiver Tracts that have been closed or never existed in the locations shown. The maps did not indicate the presence of roads in the Waiver Tracts that actually do exist and the maps showed broadband network coverage for roads that actually do not have any coverage.

Based on over 1,000 miles of drive testing and discussions with Forest Service personnel, Viaero determined that Forest Service maps, which are updated annually, are considerably more accurate than the maps relied upon by the Commission. Viaero therefore decided to undertake the task of remapping the three Waiver Tracts, using the Forest Service maps, to compare the coverage results with those produced by using the maps relied upon by the Commission.

Viaero engineers completed this remapping exercise on June 12, 2016, but the results were discouraging. As expected, the remapping project revealed that the network deployment planned by Viaero on private lands would produce a greater degree of coverage in the eligible Census Blocks than had been depicted by the Commission's maps. Viaero was forced to conclude, however, that the increased coverage that could be achieved by using Forest Service maps was

not sufficient to meet the 75 percent coverage requirement, or to provide a strong case in support of a request that the Commission waive the coverage requirement or the July 30, 2016 deadline.²² In any event, as discussed in the next section, even more discouraging news was on the horizon.

5. The June 2016 Forest Service Letter.

On June 28, 2016, the Forest Service administered the coup de grâce to Viaero's efforts to deploy network in the Waiver Tracts. Forest Supervisor Dallas, in a letter to Viaero, stated categorically that "we cannot ever anticipate approving [Viaero's] applications for the proposed [tower site] construction"²³ Forest Supervisor Dallas expressed the view that the construction would have "forest impacts" that he considered to be adverse, and he also indicated that public benefits from the tower construction would be "extremely limited" because the majority of the roads that would be served by 4G service "are administratively closed for eight months of the year."²⁴

The position articulated in the Forest Service Letter has effectively closed the door on Viaero's options for utilizing Phase I support to deploy a 4G network in any of the three Waiver Tracts. Now, all of Viaero's efforts over several years have been nullified, and Viaero is faced with the need to default on its obligation to comply with Phase I public interest obligations in the

²² Viaero's remapping produced the following results: (1) for Mineral County, network coverage achieved by Viaero's planned network deployment on private lands was 33.20 percent using Commission maps and 45.85 percent using Forest Service Maps; for Conejos County, the mapping results were 41.52 percent and 48.96 percent, respectively; and (3) for Saguache County, 58.00 percent and 62.20 percent, respectively.

²³ Forest Service Letter at 1 (emphasis added).

²⁴ *Id.*

Waiver Tracts. As Viaero has discussed above, this need to default is driven by the fact that Viaero cannot meet the required network coverage requirement if it cannot build tower sites on lands within the Forest Service's jurisdiction in the Rio Grande Forest.

III. THERE ARE SUFFICIENT GROUNDS FOR GRANTING VIAERO'S PETITION FOR WAIVER.

The Wireline Competition Bureau ("Bureau") applies the following standards for a waiver of a Part 54 rule:

Generally, the Commission's rules may be waived for good cause shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such a deviation will serve the public interest.²⁵

Pursuant to these standards, there is a strong basis for the Commission to grant the Petition.

A. Special Circumstances Warrant a Deviation from the General Rule.

Viaero has acted diligently and in good faith to meet the Phase I network coverage requirement and other public interest obligations. At the time it filed its application and participated in Auction 901, it could not have anticipated the delays and impediments that have occurred, and, ultimately, its efforts have been overwhelmed by special circumstances beyond its control.

1. Viaero's Efforts To Comply with Phase I Requirements.

As discussed in detail above, from the time it was authorized to receive Phase I funding,

²⁵ *Universal Service Contribution Methodology, Petition for Waiver of Universal Service Fund Rules by Outfitter Satellite, Inc.*, WC Docket No. 06-122, 28 FCC Rcd 13358, 13360-61 (WCB 2013) (footnotes omitted) ("*Outfitter Satellite Waiver Order*"); *see also*, 47 C.F.R. §1.3.

Viaero has taken countless steps and pursued various options to facilitate its deployment of a broadband network in the Waiver Tracts that would meet the Phase I coverage requirement and other public interest obligations. Viaero has worked closely with Forest Service officials to explore the best means of securing approvals for proposed tower site construction in the Rio Grande Forest, and also has used Phase I support and its own funds for engineering analyses and site surveys associated with its planned network.

In addition, Viaero has expended funds and resources to evaluate the option of constructing tower sites on private lands in the Waiver Tracts, and it has invested its own funds in the construction of network access facilities, in areas in proximity to eligible service areas in the Waiver Tracts, that are needed as backhaul facilities for Viaero's planned broadband network in the Rio Grande Forest. Viaero also has remapped the Waiver Tracts, utilizing Forest Service maps that provide a higher degree of accuracy than maps utilized by the Commission, for the purpose of precisely calculating the extent of network coverage Viaero could achieve in the near term by constructing tower sites on private lands in the Waiver Tracts.

In total, Viaero has expended millions of dollars and thousands of man hours to make this project work. Attempting to comply with its Auction 901 obligations in the three Waiver Tracts has drained an enormous amount from a small business operating in rural lands. These activities provide ample demonstration that Viaero has taken numerous and prudent steps, and has explored numerous reasonable options, to comply with its Phase I obligations. The delays and encumbrances that have impaired Viaero's efforts could not have been reasonably anticipated and could not have been prevented.

At the time of the auction, Viaero could not reasonably have known that the unique Forest Plan amendment process would impose a timeline of two to three years before Viaero could secure permission to construct towers at any of its proposed sites in the Rio Grande Forest, nor could Viaero have reasonably anticipated that the amendment process would be suspended, thus postponing any consideration of Viaero's site construction proposals by the Forest Service until 2018 or later, or that the Forest Service would completely close the door to construction in areas needed to meet the Phase I requirements .

2. Compliance with Phase I Is No Longer Possible.

As explained above, last month the Forest Service explicitly indicated that it could not "ever anticipate approving" Viaero's planned tower sites in the Rio Grande Forest. This is a special circumstance that Viaero could not have anticipated, and that blocks Viaero's ability to comply with the Phase I network coverage requirement. Viaero has undertaken numerous efforts, acting diligently and in good faith, to comply with the Phase I requirements, but a special circumstance beyond its control has made it impossible for Viaero to achieve compliance.

The special circumstance warrants deviation from the Commission's general rule. The general rule is that, if a recipient of Phase I support fails to comply with public interest obligations, the funding recipient will be required to pay a 10 percent performance default penalty, and may also be barred from receiving any Mobility Fund or other universal service support.²⁶ It is reasonable to assume that the Commission intended this general rule to apply in circumstances in which it is possible for the funding recipient to comply with the Phase I requirements, but the funding

²⁶ 47 C.F.R. § 54.1006(f).

recipient has defaulted because it did not take sufficient actions that it could have taken to achieve compliance.

The general rule contemplates penalizing fund recipients for their own failures that result in their non-compliance with Phase I requirements. A deviation from that general rule is warranted when, a funding recipient's failures have not led to non-compliance, but instead the funding recipient has been deprived of the means necessary to comply, through no fault of its own. Viaero's compliance with the Phase I coverage requirement is dependent upon its construction of tower sites located on lands controlled by the federal government, but Viaero has been deprived of any opportunity to construct those sites by the Forest Service's indication that it "cannot ever anticipate approving" the construction.

B. Deviation from the General Rule Is Justified by the Equities of the Case and Will Serve the Public Interest.

A corollary to the Commission's authority to prescribe rules of general application, which establish the "public interest" for a broad range of cases, is that this authority does not relieve the Commission of its obligation also to take a "hard look" in determining how best to serve the "public interest" in particular, individualized cases. Thus, the Commission's authority to waive its rules resembles an obligation—it is a *sine qua non* to its ability to adopt otherwise inflexible rules, to be exercised as a necessary "safety valve" that makes the system work.²⁷

There are two public interest grounds for deviating from the general rule of Section 54.1006(f). First, the equities of this case support the conclusion that the grant of a waiver is in

²⁷ See *WAIT Radio*, 418 F.2d at 1157, 1159 (noting that "[t]he limited safety valve [provided by the waiver process] permits a more rigorous adherence to an effective regulation").

the public interest. And, second, a grant will serve the public interest because it will promote the implementation of the Commission's Mobility Fund policies and other universal service policies.

1. Equity Warrants a Waiver of the Rule.

It has become evident that, through no fault or failure of its own, it is now impossible for Viaero to comply with the Phase I network coverage requirement. The Commission, in taking into account the equities of this case, should conclude that the public interest will be served by the Commission's refraining from the imposition of penalties.

Viaero has undertaken enormous effort and expense to achieve compliance with Phase I requirements in the Waiver Tracts. Now the Forest Service has blocked its path to compliance, permanently, because it will apparently never be able to secure the Forest Service's approval to construct tower sites in the Rio Grande Forest that are necessary to meet the Phase I network coverage obligation. Equity compels a conclusion that it would not be fair to impose penalties against Viaero in these circumstances.

In the *Outfitter Satellite Waiver Order*, the Bureau deviated from a Part 54 rule imposing penalties based on special circumstances analogous to those presented here. It determined that the petitioner was liable for true-up payments assessed by the Universal Service Administrative Company ("USAC") even though USAC had not been timely in its issuance of invoices based on its true-up calculations related to Universal Service Fund contribution obligations.²⁸

The Bureau determined however, that, in "the limited circumstance presented ... there is

²⁸ *Outfitter Satellite Waiver Order*, 28 FCC Rcd at 13364 (para. 19).

good cause to waive the interest and penalties associated with the true-up adjustment....”²⁹ The

Bureau reasoned:

Given that USAC did not bill Outfitter [the petitioner] for the true-up for over six years, we conclude there are special circumstances and find that, in this limited instance, strict enforcement of our rules regarding assessment of interest and penalties would not be consistent with the public interest in effective and efficient administration of [Universal Service] Fund contributions.³⁰

Thus, the Bureau determined in *Outfitter Satellite* that, taking into account the equities of the special circumstances presented, imposing penalties (and interest payments) would not serve the public interest. It would not be fair, the Bureau concluded, to make the petitioner pay penalties when the burden of paying those penalties had been increased through no failure of the petitioner.

The Bureau also has deviated from a general rule imposing certification filing deadlines, based on a finding that special circumstances made it impossible for petitioning parties to comply with the rule. In the *Qwest Waiver Order*,³¹ petitioners sought waiver of October 1, 2003, and January 1, 2004, filing deadlines for annual state commission certifications that non-rural eligible telecommunications carriers designated by the state commissions will use federal universal service support only for specified permissible purposes.

²⁹ *Id.* at 13364 (para. 20).

³⁰ *Id.* (footnote omitted).

³¹ *Qwest Corporation (Nebraska) Petition for Waiver of Section 54.313 of the Commission’s Rules, Qwest Corporation (South Dakota) Petition for Waiver of Section 54.313 of the Commission’s Rules, ALLTEL Nebraska, Inc. Petition for Waiver of Section 54.313 of the Commission’s Rules*, CC Docket No. 96-45, Order, 20 FCC Rcd 19200 (WCB 2005) (“*Qwest Waiver Order*”).

The Bureau concluded that special circumstances warranted a deviation from the certification filing deadlines. The Bureau determined that, because the petitioning parties and their respective state commissions were not aware of their eligibility for non-rural high-cost support prior to October 1, 2003, “they could not have met, under any circumstances, the October 1, 2003 certification filing deadline....”³²

Moreover, because the Commission did not release until December 24, 2003, a Public Notice indicating that non-rural carriers in Nebraska and South Dakota would be eligible to receive high-cost support in 2004, the Bureau found that “it was effectively impossible for the Nebraska PSC and South Dakota PUC to meet the January 1, 2004 certification deadline.”³³ The Bureau held that “[i]t would be onerous ... to deny the Petitioners receipt of universal service support for two quarters because the Commission did not determine they were eligible until after the filing deadlines.”³⁴ Here, it would not be fair to impose penalties on Viaero pursuant to Section 54.1006(f) because Viaero’s default has been compelled by the impossibility of securing tower siting rights, culminating in the Forest Service now making clear that it will not permit Viaero to construct tower sites needed to meet Phase I network coverage requirements.

It would be particularly inequitable to enforce Section 54.1006(f) in this case given the penal nature of the rule.³⁵ No penalty should be imposed on Viaero for its failure to comply with

³² *Id.* at 19203 (para. 9).

³³ *Id.*

³⁴ *Id.* at 19203-04 (para. 9).

³⁵ *See Auction 901 Public Notice*, 27 FCC Rcd at 4777 (para. 189) (referring to the performance default payment as a “performance default penalty”).

its minimum coverage requirement when compliance was impossible.³⁶ That is particularly so because Viaero's inability to construct has been caused by the actions or inaction of the Forest Service. One federal agency should not penalize a party for failing to perform an act when performance was prevented by another federal agency. The Commission should waive Section 54.1006(f) here, just as it does when a state agency prevents an applicant from complying with Section 54.504(a).³⁷

2. A Waiver Will Promote Implementation of Mobility Fund Policies.

The Commission's policy, in establishing the Mobility Fund, is to make mobile broadband services available to all Americans, including those living, working, or travelling in rural and remote areas.³⁸ At the time the Mobility Fund was created, the Commission observed that "significant mobility gaps remain a problem for residents, public safety first responders, businesses, public institutions, and travelers, particularly in rural areas. Such gaps impose significant disadvantages on those who live, work, and travel in these areas."³⁹

Granting the Petition will promote the Commission's policies underlying its creation and implementation of the Mobility Fund, by facilitating the use of Mobility Fund support and private investment to help close the mobility coverage gaps the Commission described five years ago.

³⁶ See Wayne R. LaFare & Austin W. Scott, CRIMINAL LAW § 3.3(c) at 208 (2d ed. 1986) ("one cannot be held criminally liable for failing to do an act which he is physically incapable of performing").

³⁷ See *Requests for Waiver by Puerto Rico Department of Education*, 29 FCC Rcd 14453, 14455-56 (WCB 2014).

³⁸ *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17773 (para. 301) (2011), *aff'd sub nom. In re FCC 11-161*, 703 F.3d 1015 (10th Cir. 2014).

³⁹ *Id.* at 17773-74 (para. 301).

Notwithstanding Viaero's need to default with respect to its use of Phase I support for deployment of a 4G network in the Waiver Tracts, Viaero plans to continue its efforts—funded by its own capital investments—to bring broadband service to the Rio Grande Forest and in adjacent areas to the greatest extent possible given its resources.

Denial of the Petition, and the imposition of a performance default payment pursuant to Section 54.1006(f), would reduce the resources available to Viaero to fund these planned efforts. The Forest Service has indicated that emergency communications and first responder effectiveness would be greatly improved if wireless networks provided coverage for major highway corridors in the Rio Grande National Forest.⁴⁰ Viaero continues to look for ways to improve coverage along these roads, with its own funds, and a grant of the waiver request will increase the company's ability to expand service in this area.

More generally, grant of the Petition will promote implementation of the Commission's Mobility Fund and other universal service policies because it will avoid the risk of suppressing participation in the Commission's funding mechanisms by carriers that otherwise would be involved in building the networks that will bring advanced broadband services to consumers in rural and remote regions across America.

Generally, carriers' commitments to participating in the Commission's universal service programs could be diminished if the Commission were to make it evident that carriers will be subject to default penalties even in cases in which it has become impossible for them to comply

⁴⁰ Forest Service Letter at 1. The Letter indicates that the major highway corridors—Colorado Highways 17, 114, 149, and 160—“are poorly served by wireless communications today and are kept open throughout the year by the State of Colorado.” *Id.*

with applicable public interest obligations. The Commission's utilization of the waiver in this case as a limited safety valve will serve the purpose intended by *WAIT Radio*: Taking a "hard look" at special circumstance, and waiving Phase I penalties because they are not warranted, will "maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility."⁴¹

IV. CONCLUSION.

Viaero respectfully submits that it has demonstrated good cause for a waiver of the Commission's rules, as set forth above, and that waiver of the Commission's rules will serve the public interest. Viaero therefore respectfully requests that the Commission act promptly to grant the Petition.

Respectfully submitted,

N.E. COLORADO CELLULAR, INC.
d/b/a VIAERO WIRELESS

By: _____

David A. LaFuria
John Cimko

LUKAS, NACE, GUTIERREZ & SACHS, LLP
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McLean, Virginia 22102
(703) 584-8678

Its Attorneys

July 29, 2016

⁴¹ *WAIT Radio*, 418 F.2d at 1159.

EXHIBIT A

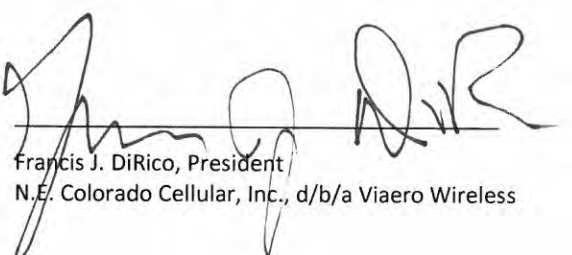
DECLARATION UNDER PENALTY OF PERJURY

DECLARATION UNDER PENALTY OF PERJURY

I, Francis J. DiRico, hereby declare under penalty of perjury as follows:

1. I am the President of N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless, ("Viaero Wireless").
2. This Declaration is submitted in support of the Petition for Waiver of Performance Default Payment Requirements and Other Liabilities Applicable to Failures To Satisfy Mobility Fund Phase I Public Interest Obligations ("Petition"), to be filed with the Commission by Viaero Wireless on July 29, 2016.
3. I declare under penalty of perjury, pursuant to Sections 502 and 503(b) of the Communications Act of 1934 and Section 1001 of Title 18, United States Code, that the facts and information contained in the foregoing Petition are true and correct to the best of my knowledge.

Executed on July 29, 2016

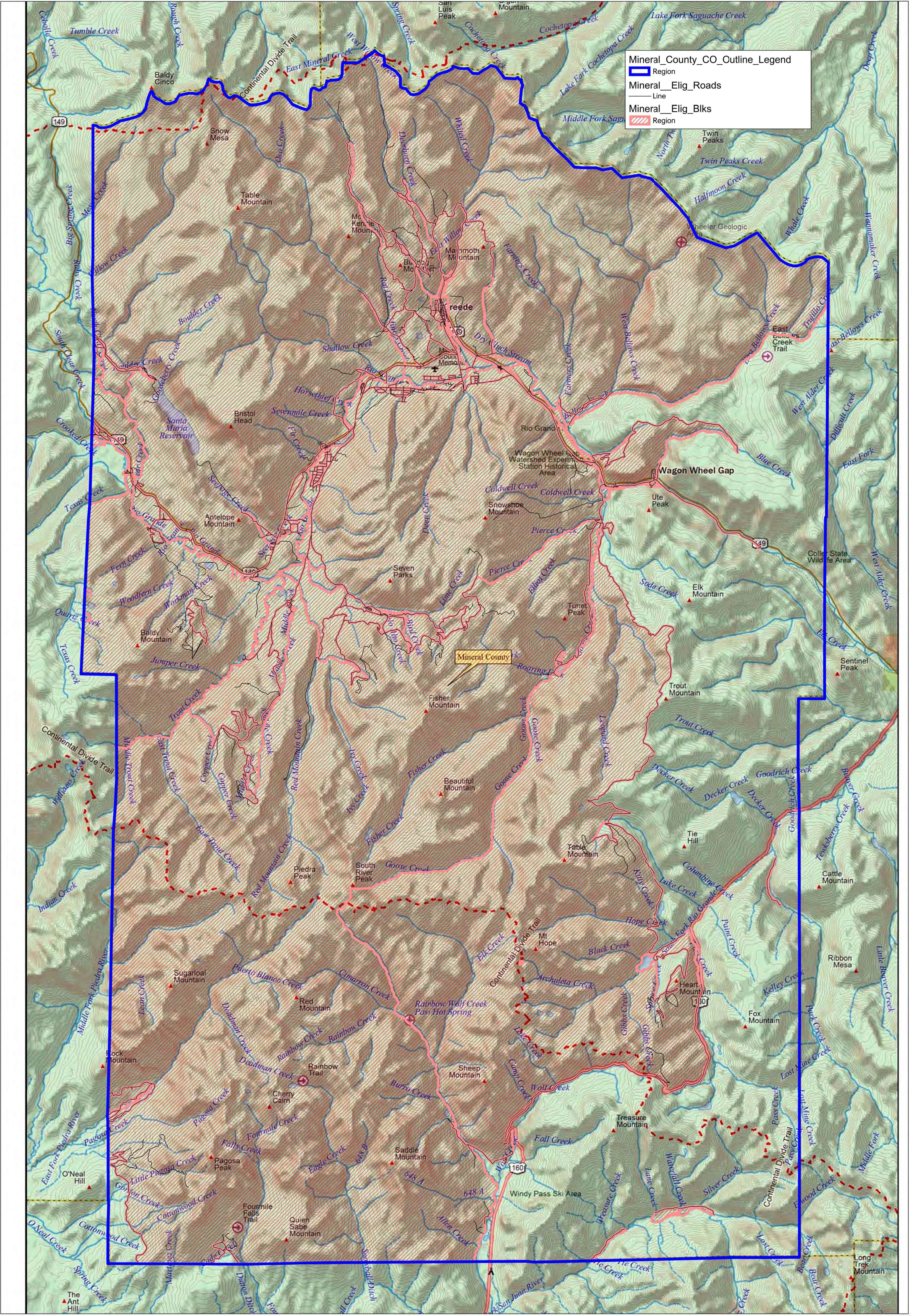


Francis J. DiRico, President
N.E. Colorado Cellular, Inc., d/b/a Viaero Wireless

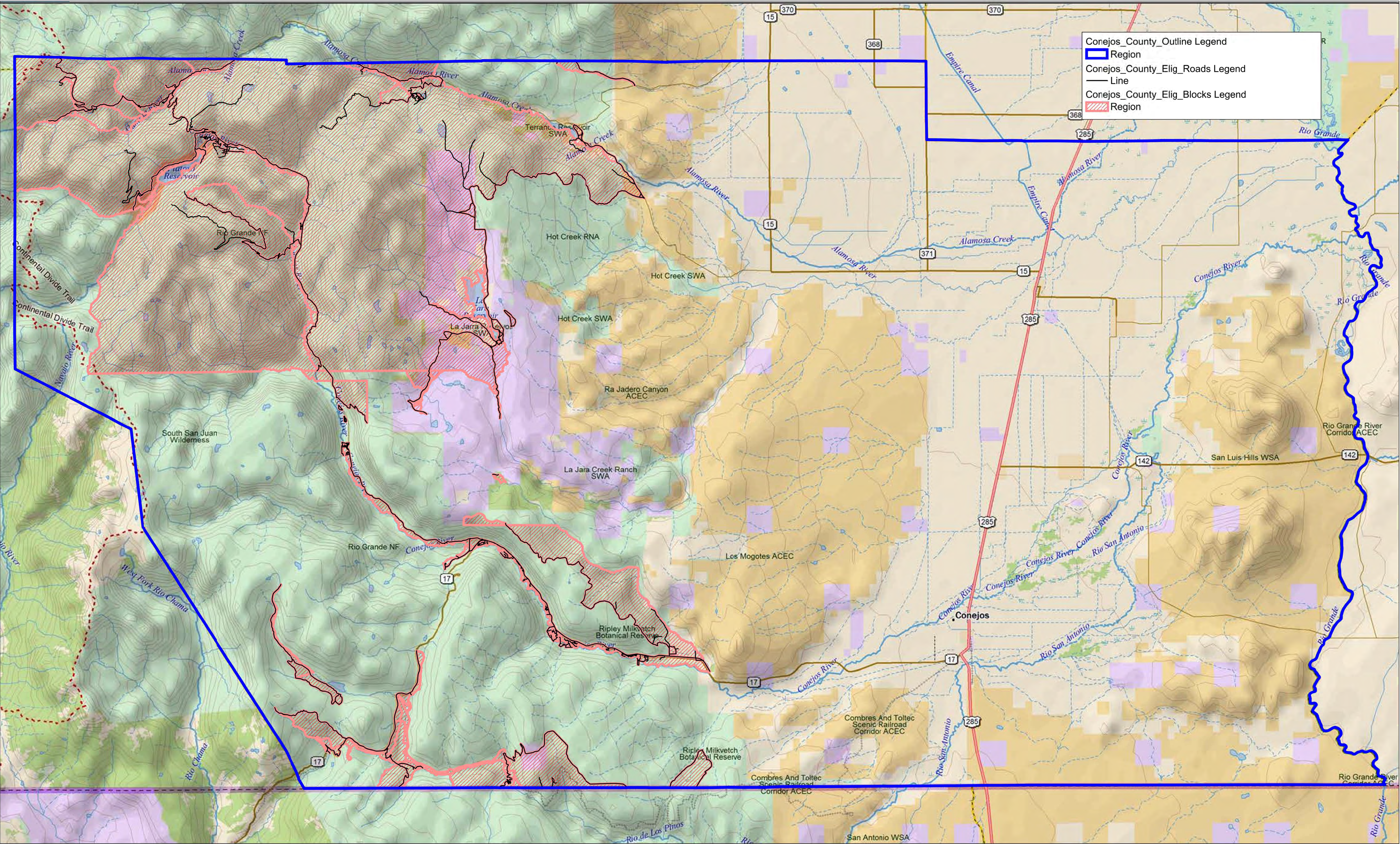
EXHIBIT B

**MAPS OF WAIVER TRACTS SHOWING FOREST SERVICE LAND
AND ELIGIBLE CENSUS BLOCKS**

Mineral County CO Covered Census Blocks and Roads



Conejos County CO Covered Census Blocks and Roads



Saguache County CO Covered Census Blocks and Roads

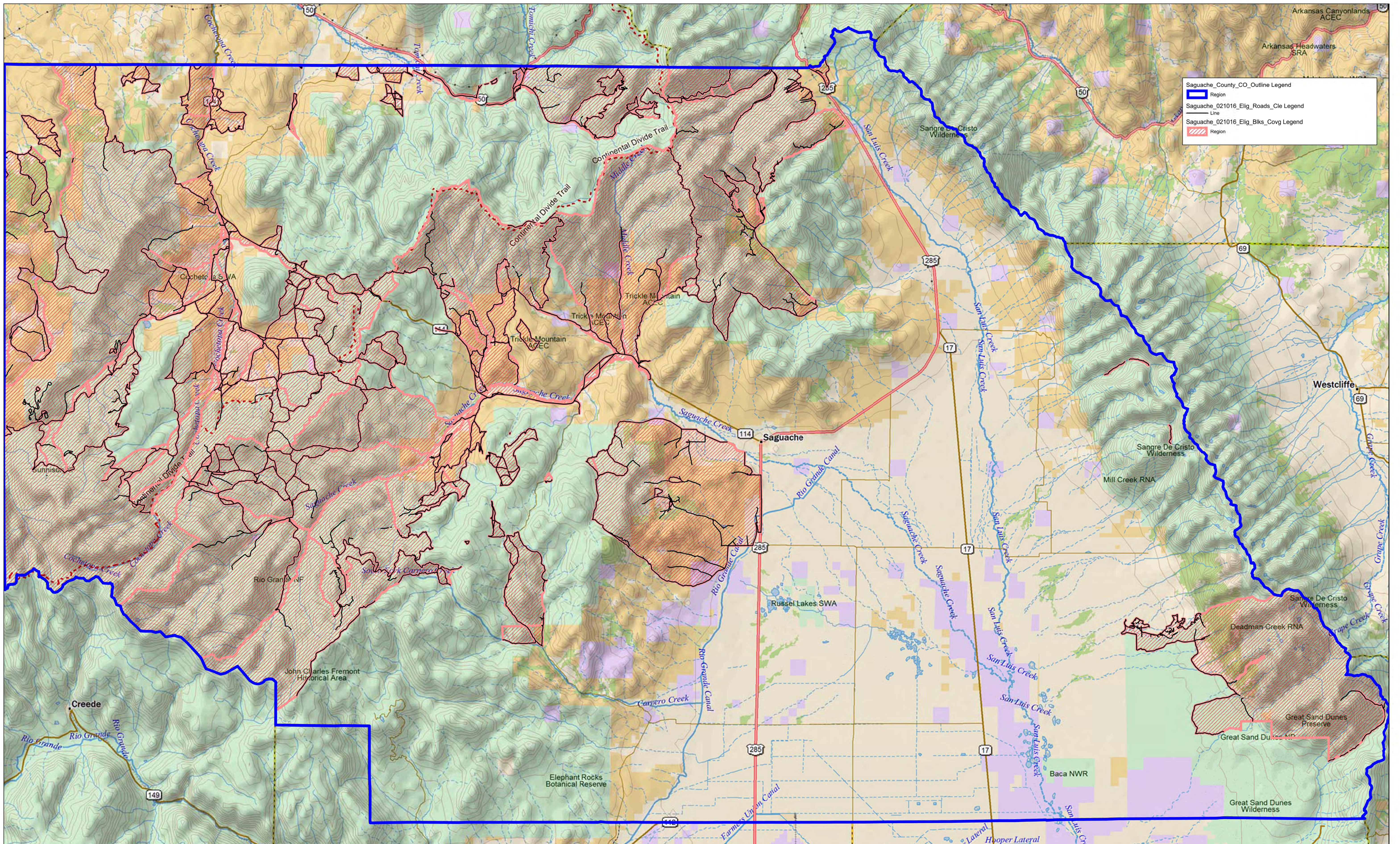


EXHIBIT C

**JUNE 28, 2016, LETTER FROM U.S. FOREST SERVICE
TO VIAERO WIRELESS**



United States
Department of
Agriculture

Forest
Service

Rio Grande National Forest

1803 West Highway 160
Monte Vista, CO 81144
719-852-5941
TDD: 719-852-6271
FAX: 719-852-6250

File Code: 6220; 2720
Date: June 28, 2016

Jon Becker
Vice President Government Affairs
Viaero Wireless
1224 West Platte Avenue
Fort Morgan, CO 80701

Dear Mr. Becker:

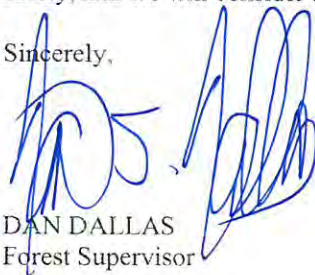
Henry Jacobsen of your staff has spent many hours with me and my staff, outlining the objectives and requirements of the FCC Mobility Fund which he has referred to as "Auction 901". We have discussed at length the issues of road miles within the forest and the requirement to cover a minimum of 75% of those roads within a specified length of time, to meet grant funding requirements.

Your three-part FCC grant roughly corresponds to the three districts of the Rio Grande National Forest that I administer: Saguache, Divide (Mineral County), and Conejos Peak. Henry has provided us with several network alternatives for meeting grant requirements, all of which involve significant construction in remote areas of my forest districts. Additional construction would be within the Gunnison National Forest, which is not under my jurisdiction. Henry has also identified some "island" properties that are privately owned; however, it appears that significant road improvements within the forest will be required to build on those sites.

As I am sure Henry has explained to you, we are in the midst of a Forest Plan revision, and will be in no position to address your grant construction applications until 2018, at the earliest. Notwithstanding, I advise you now that we cannot ever anticipate approving applications for the proposed construction, given the forest impacts and the extremely limited benefit to the public. The majority of these roads are administratively closed for eight months of the year.

We have expressed to Henry our support for communications along the major highway corridors passing through the Rio Grande Forest, i.e., Colorado Highways 114, 149, 160 and 17. These highways are poorly served by wireless communications today and are kept open throughout the year by the State of Colorado. As a result, emergency communications and first responder effectiveness can be greatly improved by the construction of additional telecommunications sites along these routes. There are special provisions within the National Forest Management Act for supporting "communications corridors" along such high-volume highways, specifically in support of public safety, and we will consider limited proposals to that end.

Sincerely,



DAN DALLAS
Forest Supervisor

cc: Andrew Peterson,

